

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Amendment to the Commission's	)	IB Docket No. 95-41
Regulatory Policies Governing	)	
Domestic Fixed Satellites and	)	
Separate International Satellite Systems	)	

**OPPOSITION OF GE AMERICAN COMMUNICATIONS, INC.**

GE American Communications, Inc. ("GE Americom"), pursuant to Section 1.429 of the Commission's Rules, 47 C.F.R. § 1.429, hereby opposes the petitions for reconsideration of the Commission's Order in the above-captioned proceeding, 11 FCC Rcd 2429 (1996) (hereinafter, "Order").<sup>1</sup> The petitions object to three aspects of the Order: the adoption of a "one-step" financial qualifications test for all applications in the fixed satellite service; the decision to consider all FSS applications in consolidated processing rounds; and deferral of issues relating to provision of domestic service by COMSAT.

In each case the Commission's action should be affirmed. The Commission properly determined that applying the one-step financial test across-the-board was necessary to speed service to subscribers and prevent warehousing of valuable orbital locations. The Commission also correctly decided that uniform

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<sup>1</sup> Petitions were filed by Columbia Communications Corporation ("Columbia"), COMSAT Corporation ("COMSAT"), Orion Network Systems, Inc. ("Orion"), and PanAmSat Corporation ("PanAmSat") (collectively referred to herein as "Petitioners").

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processing of all applications is a necessary corollary to elimination of substantive distinctions between domestic and international satellite systems. Finally, because treatment of COMSAT raises unique issues, the Commission's decision to defer those issues to a further proceeding was clearly reasonable.

**I. UNIFORM APPLICATION OF THE ONE-STEP FINANCIAL TEST IS NEEDED TO ENSURE EFFICIENT ALLOCATION OF VALUABLE ORBITAL RESOURCES**

In their petitions, Columbia, Orion and PanAmSat repeat their objections to the adoption of a uniform one-step financial qualifications test for all FSS applicants. These parties argue that the one-step test will impede entry by new carriers and does not properly recognize the obstacles faced by providers of international service.

The Commission fully considered and properly rejected these claims in its Order. The Commission concluded that a uniform one-step test was necessary to "prevent service delays and to allow the maximum number of qualified applicants to go forward." Order at 2435. The Commission's primary concern was ensuring that scarce orbital resources are not tied up by entities that lack adequate funds to construct and operate their proposed systems.

Petitioners provide no basis to question the Commission's analysis here. PanAmSat argues that the one-step test is inconsistent with the Commission's desire to encourage entry by new carriers. See PanAmSat Petition at 7. The Commission, however, determined that its objective of speeding delivery of service to users would be undermined if it permitted applicants without the

necessary funds to hold orbital slots. Accordingly, although the Commission expressed its sympathy for smaller companies without ready access to the “hundreds of millions of dollars needed to construct a satellite system,” it concluded that the public interest would not be served by permitting companies without adequate funding to retain orbital locations at the expense of companies who are financially prepared to go forward. Order at 2435.<sup>2</sup>

The Commission did, however, provide for more lenient treatment of applicants in circumstances where there is less danger of warehousing because orbital slots are in lower demand. The Order expressly provides for waiver of the one-step financial test if an applicant is seeking a slot in an “uncongested” portion of the orbital arc. The applicant must describe its attempts to obtain financing, explain why such attempts were unsuccessful, and show that waiver of the one-step test would not result in misuse of scarce orbital resources. Id.

Thus, contrary to the claims of Columbia (Columbia Petition at 5-6), the Order properly balances the special circumstances faced by international providers against the Commission’s goal of preventing service delays due to warehousing of orbital slots. To the extent that an applicant’s ability to secure financing is actually impaired by the need to complete INTELSAT consultation and

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<sup>2</sup> The Commission stated that its “repeated experience is that applicants without ready access to the needed financing have difficulty obtaining that financing, and that their attempts are often unsuccessful. This has allowed applicants to hold orbital resources to the detriment of others willing and able to go forward immediately. This ultimately results in fewer choices to the public and less competition.” Id. (footnote omitted).

obtain operating authority from foreign administrations, the Order permits waiver of the one-step test -- provided that the applicant is seeking a slot in an uncongested part of the arc.<sup>3</sup>

The suggestions of Petitioners regarding alternative means of preventing warehousing of orbital slots are clearly inadequate. PanAmSat, for example, argues that the Commission should apply strict construction milestones. See PanAmSat Petition at 7. That approach, however, would not prevent warehousing; it would simply place an outside limit on how long an applicant without the funds to go forward could hold onto its orbital assignment. The Commission's goal of expediting delivery of service to the public requires that the Commission identify unqualified applicants *before* it assigns orbital locations.

The arguments of Orion and Columbia also fail. Orion makes the peculiar claim that the greatest incentive to warehouse orbital locations rests with highly-capitalized entities like GE Americom, Hughes and AT&T. See Orion Petition at 8. Columbia contends that the Commission should cap the number of orbital locations held by a single entity to prevent well-financed carriers from hoarding available orbital slots. See Columbia Petition at 17. Both companies conveniently ignore the fact that there is absolutely no evidence to support their

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<sup>3</sup> Columbia also argues that applications that are currently on file for slots outside the traditional domestic arc should be processed under the two-step test. See Columbia Petition at 16. Of course, the Order expressly permits use of the two-step standard if the applicants provide the required showing for a waiver.

allegations. For its part, GE Americom has constructed more than fifteen satellites during the company's corporate history.

Finally, Orion argues that the Commission's policy will put U.S. licensed companies at a competitive disadvantage because the Commission cannot prevent foreign-licensed entities from warehousing orbital locations. See Orion Petition at 7-8. GE Americom agrees that warehousing by foreign providers is a problem. However, that problem cannot be solved by weakening Commission policies designed to ensure that only financially qualified entities are given orbital assignments. Instead, the solution is to reform ITU procedures regarding prioritization of satellite filings in order to deter warehousing by *all* providers. Enforcement of FCC financial qualifications standards strengthens the ability of the United States to seek stricter due diligence policies in international forums.

## **II. THE COMMISSION PROPERLY DETERMINED THAT CONSOLIDATED PROCESSING ROUND TREATMENT OF ALL FSS APPLICATIONS IS APPROPRIATE**

PanAmSat and Orion also object to the Commission's decision to consider all FSS applications filed after the adoption date of the Order in consolidated processing rounds. In fact, however, the Commission clearly acted within its authority in adopting the processing round requirement. Indeed, consistent processing of all FSS applications is a necessary element of the Order's elimination of distinctions between domestic and international satellite systems.

**A. The Commission Complied With Applicable Notice Requirements in Promulgating the Processing Round Rule**

PanAmSat's claim that the Commission violated the Administrative Procedure Act ("APA") in adopting the consolidated processing round rule is completely groundless. The rule is one of agency practice and procedure and is therefore exempt from APA notice requirements. In any event, the rule represents a logical outgrowth of the Commission's decision to unify its treatment of all FSS applications.

PanAmSat's Petition merely repeats arguments it has made in requesting a waiver of the processing round requirement with respect to certain applications PanAmSat filed after the Order was adopted.<sup>4</sup> In its pleadings opposing that waiver request, GE Americom has fully refuted those arguments, and we incorporate our submissions by reference herein.<sup>5</sup> Rather than repeat our analysis at length here, GE Americom will simply summarize it briefly for the Commission's convenience.

The APA expressly provides that "rules of agency organization, procedure, or practice" are exempt from its notice and comment requirements. See 5 U.S.C. § 553(b)(A). That exemption clearly applies to the Commission's adoption of a consolidated processing round requirement because the new rule has no

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<sup>4</sup> *See Emergency Request for Waiver of PanAmSat Licensee Corporation*, File No. 58-SAT-WAIV-96 (filed Feb. 2, 1996).

<sup>5</sup> *See Opposition of GE American Communications, Inc.*, File No. 58-SAT-WAIV-96 (filed March 15, 1996); *Reply of GE American Communications, Inc.*, File No. 58-SAT-WAIV-96 (filed Apr. 12, 1996).

substantive impact on the rights of PanAmSat or any other prospective FSS applicant.

For example, the D.C. Circuit has held that rules that do not “change the *substantive standards* by which the FCC evaluates license applications” are not subject to the APA’s notice and comment requirement.<sup>6</sup> Similarly, in *Neighborhood TV Co. v. FCC*, the court held that the FCC did not violate the APA in adopting a freeze on certain television translator applications or in deciding to process the applications pursuant to new guidelines, rather than on a first-come, first-served basis.<sup>7</sup> The court reasoned that the new procedures did not impact “those interests ultimately at stake in the agency proceeding” -- the applicant’s ability to compete for licenses against other qualified entities. *Id.* at 637. Because the rule is procedural, the Commission was not required to provide any prior notice of its intent to implement consolidated processing rounds for FSS applications.<sup>8</sup>

In any event, PanAmSat concedes that APA requirements are met if the rule adopted is a “logical outgrowth” of the rules proposed. PanAmSat Petition

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<sup>6</sup> *JEM Broadcasting Co. v. FCC*, 23 F.3d 320, 327 (D.C. Cir. 1994) (emphasis in original).

<sup>7</sup> 742 F.2d 629, 636-639 (D.C. Cir. 1984).

<sup>8</sup> As a result, PanAmSat’s claim that the Order was inconsistent with the International Bureau’s statement that it would consider application processing issues in its “satellite roundtable,” PanAmSat Petition at 3-4, is unavailing. The Commission clearly has authority to change its processing rules at any time, with or without prior notice and opportunity for comment. The Bureau’s decision to consider processing issues in the context of the satellite roundtable clearly cannot limit the Commission’s authority to revise its policy in the interim, nor does it alter the procedural character of the rule.

at 2. In this case, uniform processing of FSS applications was not only a logical, but a necessary result of the Commission's elimination of all the substantive distinctions that previously existed between domestic and international satellites. Like the decision to apply a common financial standard to all applications, the adoption of consistent processing rules for all FSS applications was mandated by the Commission's overall policy decision to treat all FSS systems under a unified regulatory scheme. As a result, PanAmSat's claim that it had no reason to anticipate a change in the processing rules is unpersuasive.

#### **B. Consistent Processing of All FSS Applications Is Required**

The policy-based objections of PanAmSat and Orion to the consolidated processing round rule must also be rejected. As noted above, the uniform processing of all FSS applications is a necessary outcome of the Order's elimination of the distinctions between domsats and separate systems.

The suggestions by PanAmSat and Orion that the Commission should not apply processing round treatment to international applications (PanAmSat Petition at 4; Orion Petition at 14) ignore this critical fact. The Order erases the substantive differences between domsats and international separate systems. As a result, the Commission could not continue to handle applications under two sets of procedures -- using processing rounds for domsats and case-by-case treatment of separate systems -- because the rules no longer recognize any regulatory distinctions among U.S.-licensed satellite providers. Neither PanAmSat nor Orion makes any attempt to provide a reasoned basis on which the Commission could



selectively apply differential processing rules, given its decision to treat all FSS systems under a unified regulatory framework. Their objections are wholly without merit.

### **III. COMSAT'S REQUEST FOR DOMESTIC AUTHORITY SHOULD BE CONSIDERED IN THE CONTEXT OF DISCO II**

Finally, the Commission should reject COMSAT's request for immediate interim authority to provide domestic service. See COMSAT Petition at 1. The Order properly deferred to the pending DISCO II proceeding<sup>9</sup> issues related to the delivery of service over non-U.S.-licensed satellite systems, including Intelsat satellites.

COMSAT argues that the Order unfairly singles it out as the only U.S.-licensed entity that is not permitted to provide integrated domestic and international service. See COMSAT Petition at 5. However, as GE Americom pointed out in its comments below, Intelsat retains a complete or virtually complete monopoly in many markets.<sup>10</sup> As a result, consideration of whether COMSAT should be permitted to use Intelsat capacity for U.S. domestic service raises significant competitive concerns that do not apply to the provision of domestic service by separate international satellite systems.

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<sup>9</sup> Notice of Proposed Rulemaking, Amendment of the Commission's Regulatory Policies to Allow Non-U.S.-Licensed Space Stations to Provide Domestic and International Satellite Service in the United States, IB Docket No. 96-111 (released May 14, 1996) (hereinafter, "DISCO II Notice").

<sup>10</sup> Comments of GE American Communications, Inc. at 12, IB Docket No. 95-41 (filed June 8, 1995).

Accordingly, the Commission correctly determined that questions related to COMSAT should be addressed under the policies to be adopted in DISCO II concerning the terms under which non-U.S. satellites should be allowed to serve the U.S. market. See DISCO II Notice at 22. The record developed in DISCO II will permit the Commission to make an informed decision regarding this important issue based on input from all affected parties.

### CONCLUSION

Petitioners have not demonstrated any justification for modifying the Order. The Commission's decisions to adopt a uniform one-step financial test, to require consolidated processing round treatment of all applications, and to defer consideration of COMSAT's ability to provide domestic service were clearly reasonable and should be affirmed.

Respectfully submitted,

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May 21, 1996

## **CERTIFICATE OF SERVICE**

I hereby certify that on this 21st day of May, 1996, a copy of the foregoing Opposition of GE American Communications, Inc. was served by first class mail, postage prepaid addressed to the following:

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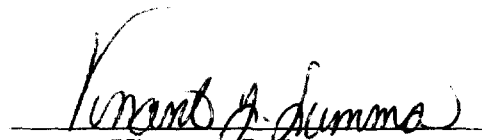
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